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BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

UTAH CHAPTER OF THE SIERRA CLUB, et al.,
Petitioners,

DIVISION OF OIL, GAS AND MINING,
Respondent, and

ALTON COAL DEVELOPMENT, LLC, and KANE COUNTY, UTAH,
Intervenors-Respondents.

Docket No. 2009-019
Cause No. C/025/0005

PETITIONERS' MEMORANDUM IN OPPOSITION TO DIVISION'S MOTION TO DISMISS CERTAIN CLAIMS AND ALTON COAL DEVELOPMENT'S SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT

Utah Chapter of the Sierra Club ("Sierra Club"), Southern Utah Wilderness Alliance ("SUWA"), Natural Resources Defense Council ("NRDC"), and National Park Conservation Association ("NPCA") (collectively "Petitioners") oppose the Motion to

Dismiss Certain Claims filed by the Division of Oil, Gas and Mining ("Division") on January 13, 2010. The Division seeks to dismiss Petitioners' claims related to cultural/ historic resources, air quality and wildlife. The Division argues that it does not have the legal obligations to address these issues that Petitioners assert. The Division's position, however, conflicts with the unambiguous language of the relevant statutes and regulations. In addition, the Division's position conflicts with applicable case law.

Petitioners also oppose the Second Motion for Partial Summary Judgment filed by Alton Coal Development, LLC ("ACD") on January 15, 2010. Three of the four issues raised in ACD's Second Partial Motion for Summary Judgment relate to the same claims by Petitioners challenged by the Division. Petitioners address the specifics of ACD's arguments related to cultural/historic resources, air quality and wildlife herein. Petitioners address ACD's argument related to alternative sources of water and water replacement obligations in their opposition to ACD's First Motion for Partial Summary Judgment addressing hydrologic issues.

I.

Standard of Review/ Jurisdiction of the Board

The Division faces a high hurdle in justifying its Motion to Dismiss. As the Division itself acknowledges, the Board must accept as true the facts alleged by Petitioners in their request for agency action and a hearing. Div. Motion to Dismiss at 1-2, *citing Oakwood Village LLC v. Albertsons, Inc.*, 104 P.3d 1226, 1230 (Utah 2004) ("A Rule 12(b)(6) motion to dismiss admits the facts alleged in the complaint but challenges the plaintiff's right to relief based on those facts."). In ruling on the Division's Motion to Dismiss, the Board "must construe the claim in the light most favorable to plaintiff and

indulge all reasonable inferences in his or her favor." *Mounteer v. Utah Power & Light Co.*, 823 P.2d 1055, 1058 (Utah 1991); *see also Berneau v. Martino*, 2009 UT 87, ¶ 3, 2009 WL 5013497, *1 (Utah 2009). "If there is any doubt about whether a claim should be dismissed for lack of factual basis, the issue should be resolved in favor of giving the party an opportunity to present its proof." *Ho v. Jim's Enterprises, Inc.*, 29 P.3d 633, 636 (Utah 2001).

Here, Petitioners have identified unambiguous language in the Division's own regulations imposing certain legal obligations related to cultural/ historic resources, air quality and wildlife that the Division must meet prior to permit application approval. As explained below, the Division must analyze the impacts of the proposed Coal Hollow Mine operations on cultural and historic resources before approving the permit application. The operations analyzed must include the hauling of coal through the Panguitch National Historic District. In addition, the Division must determine the adequacy of ACD's fugitive dust control plan and monitoring prior to approving the Coal Hollow Mine application. Finally, the Division must determine the adequacy of ACD's wildlife protection plan prior to approving the Coal Hollow Mine application. Petitioners have alleged facts establishing that the Division failed to meet these legal obligations. Consequently, no basis exists for granting the Division's Motion to Dismiss.

Likewise, ACD cannot justify its Second Motion for Partial Summary Judgment. As explained fully in *Petitioners' Memorandum in Opposition to the First Motion for Partial Summary Judgment Filed by Alton Coal Development, L.L.C.*, the Board lacks authority to enter summary judgment in formal adjudicatory proceedings concerning approval of applications to conduct surface coal mining operations. Pet. Opp. Memo to

First Partial SJ Motion at 2-8. Petitioners herein incorporate fully the arguments regarding the absence of Board authority to grant summary judgment articulated in *Petitioners' Memorandum in Opposition to the First Motion for Partial Summary Judgment Filed by Alton Coal Development, L.L.C.* Even if the Board finds that it has authority to grant summary judgment in this proceeding, Petitioners' genuine dispute of the material facts upon which ACD bases it challenge to the claims related to cultural/ historic resources, air quality and wildlife precludes entry of summary judgment. *See* Utah R. Civ. P. 56(c). In their Request for Agency Action and a Hearing, Petitioners cited publically available documents sufficient to create a genuine dispute as to the adequacy of the Division's analysis of the cultural/ historic, air quality and wildlife issues prior to approving the Coal Hollow Mine permit.

II.

The Division is Required to Analyze the Harm to the Panguitch National Historic District Prior to Approval of the Proposed Coal Hollow Mine.

The Division's regulations require each permit application to analyze potential adverse impacts from the proposed coal mining operations to "cultural and historic resources listed or eligible for listing in the National Register of Historic Places and known archaeological sites within the permit and adjacent areas." UT ADC R645-301-411.140. The regulations require the Division to make an explicit finding that it "has taken into account the effect of the proposed permitting action on properties listed on and eligible for listing on the National Register of Historic Places." UT ADC R645-300-133.600. This finding must be supported by "information set forth in the application or from information otherwise available that is documented in the approval." UT ADC R645-300-133. Furthermore, the Division's regulations require that a mine permit

application include a plan to prevent or minimize adverse impacts to "publicly owned parks or places listed on the National Register of Historic Places." UT ADC R645-301-411.142. Petitioners alleged in their request for agency action and a hearing that the Division failed to meet its responsibilities to protect cultural and historic resources in approving the Coal Hollow Mine permit application. Accepting Petitioners' allegations as true, which the Board must do in reviewing a motion to dismiss, Petitioners have stated a claim to which they are entitled to relief.

The Panguitch National Historic District is within the scope of what must be analyzed to meet the Division's legal obligations to protect cultural and historic resources. The proposed Coal Hollow Mine is expected to result in hundreds of double trailer coal truck trips per day directly through the Panguitch National Historic District. Pet. Req. at 9. Numerous concerns were raised during the permit review regarding the mine's adverse effects on the Panguitch National Historic District. Both the National Park Service and the National Forest Service requested that analysis of the proposed mine include how the increased truck traffic would impact the city of Panguitch. Pet. Req. at 9. In the words of the National Forest Service, "[i]ncreased traffic would have a negative impact on both residents, which include employees, and visitors to the area." *Id.* The National Park Service echoed these concerns. *Id.* Sixteen Panguitch business and homeowners submitted comments to the Division raising concerns about the effects to the tourist industry and to their safety by the transportation of coal in the SR 89 corridor and through the Panguitch National Historic District. *Id.*

Even the Division staff recognized the relevance of the Panguitch National Historic District to its analysis of the proposed Coal Hollow Mine. The Division's

Technical Analysis supporting its permit approval explicitly recognizes the need to address "[i]ndirect effects, such as transportation." Utah Division of Oil Gas and Mining, *Decision Document and Application Approval (October 15, 2009), Technical Analysis* (hereafter "*Final TA*") at 19. In addition, the Division highlighted the need to include "other cultural resources such as the National Register of Historic Places Historic District in Panguitch" as part of the effected environment. *Id.* The problem with the Division's approval of ACD's permit application is that no analysis of the impacts of the proposed Coal Hollow Mine on the Panguitch National Historic District was included despite the Division's explicit request for such analysis. The Division's approval without this analysis violates its legal obligations to protect cultural and historic resources.

A. Analysis of Impacts to Panguitch National Historic District is Not Limited to Approval of Federal Leases.

The analysis of the impacts of the proposed Coal Hollow Mine on the Panguitch National Historic District is relevant to both the Division's obligations under state law and to the Bureau of Land Management's ("BLM") obligations under federal law. ACD incorrectly suggests that analysis of the proposed mine's impact on the Panguitch National Historic District is only relevant to BLM's decision to lease federal coal and not to the Division's permit approval for the mine on private lands. ACD Second Partial SJ Motion at 14-15. The Panguitch analysis is required under Utah state law as well as under the National Environmental Policy Act ("NEPA") and the National Historic Preservation Act ("NHPA"). Utah's coal permitting regulations require the Division to make a "[w]ritten finding . . . on the basis of information set forth in the application" that the Division has "taken into account the effect of the proposed permitting action on

properties listed on and eligible for listing on the National Register of Historic Places." UT ADC R645-300-133.600. In reviewing ACD's permit application, the Division itself recognized that the hundreds of coal truck trips through the Panguitch National Historic District were an "effect of the proposed permitting action." *Final TA*, at 19.

Moreover, Utah statutes impose an explicit legal obligation on all state agencies including the Division here to "take into account the effect . . . on any historic property" *before* "expending any state funds or approving any undertaking." Utah Code § 9-8-404(1)(a). The Division cannot meet this mandatory statutory duty without assessing the impacts of the proposed Coal Hollow Mine on the Panguitch National Historic District *before* approving ACD's permit application.

B. The Public Road Exclusion is Not Applicable to Petitioners' Cultural/ Historic Resource Claim.

The effects that the Division must analyze to meet its legal obligations to protect cultural and historic resources are not limited to haul roads that require a Division permit. The Division argues that the term "'coal mining and reclamation operations' expressly excludes from its definition and its regulatory reach the hauling of coal on public highways." Div. Motion to Dismiss at 4. The Division's argument suffers several fatal flaws. First, the definition of "coal mining and reclamation operations" *does not* expressly exclude the hauling of coal on public highways. *See* UT ADC R645-100-200. The words of the definition include "all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of those activities and for haulage." *Id.* The definition of "coal mining and reclamation operations" does not explicitly mention "public highways." *Id.* Such definition is consistent, as it must be, with the statutory provisions of the federal Surface Mining Control and Reclamation Act

("SMCRA"). 30 U.S.C. § 1291(28); 30 C.F.R. § 730.11. *See also In re. Permanent Surface Min. Regulation Litigation*, 620 F.Supp. 1519, 1582 (D.D.C. 1985) (SMCRA does not include a blanket exemption for public roads used for hauling coal).

The reference to public roads comes from the definition of "affected area." UT ADC R645-100-200. The definition of affected area "shall include every road used for purposes of access to, or for hauling coal to or from, coal mining and reclamation operations, unless the road (a) was designated as a public road pursuant to the laws of the jurisdiction in which it is located; (b) is maintained with public funds, and constructed, in a manner similar to other public roads of the same classification within the jurisdiction; and (c) there is substantial (more than incidental) public use." The Division fails to mention that this exclusion was held unlawful by a federal district as inconsistent with SMCRA. *In re. Permanent Surface Min. Regulation Litigation*, 620 F.Supp. at 1582.[1]

Both the Division and ACD incorrectly suggest that the debate over which public roads used for hauling coal require a permit is relevant to this matter. Div. Motion to Dismiss at 4-5; ACD Second Partial SJ Motion at 15-18. Admittedly, the question of whether a public road used for hauling coal requires a permit is a challenging and complex one. The federal Office of Surface Mining ("OSM") has failed to promulgate new regulations to replace the ones suspended and remanded in *In re. Permanent Surface Min. Regulation Litigation*, 620 F.Supp. at 1582. Following *In re. Permanent Surface*

[1] An editorial note to the Division's own regulations indicates the questionable legality of public road exemption upon which the Division relies in its Motion to Dismiss. *See* UT ADC R645-100-200 ("Editorial Note: The definition of 'Affected area', insofar, as it excludes roads which are included in the definition of 'Surface coal mining operations', was suspended at 51 FR 41960, Nov. 20, 1986. Accordingly, Utah suspends the definition of Affected Area insofar as it excludes roads which are included in the definition of 'coal mining and reclamation operations.'").

Min. Regulation Litigation, the State of Utah and OSM reached an agreement providing for the revision of Utah's regulations to ensure consistency with federal requirements. 59 Fed. Reg. 16538 (April 7, 1994). Whether Utah's current regulations satisfy what OSM believes is necessary to meet federal requirements is unclear. In an apparent attempt to provide greater regulatory clarity, the Division articulated in 1995 in a letter to OSM a plan for permitting public roads used for coal hauling. *See* ACD Second Partial SJ Motion at 16.

ACD's reliance on the 1995 letter is misplaced. According to its express terms, the letter is limited to the "permitting of roads." The letter acknowledges that certain roads – whether they are "public or private" – may require a coal mining permit. Letter from Division Director James W. Carter to OSM (July 3, 1995) (hereafter "1995 Division Letter") at 1 (attached as Exh. J to ACD Second Partial SJ Motion). The federal case ACD cites relates to whether a road used for hauling requires a permit. *See Harmon v. Office of Surface Mining Reclamation and Enforcement*, 659 F.Supp. 806, 812 (W.D. Va. 1987) ("the roads are public and, therefore, . . . Harman is not required to permit them"). The prior Board decision cited by ACD also relates to whether a road used for hauling requires a permit. *SUWA v. Division*, Cause No. C/007/0013, Board Findings of Fact, Conclusions of Law and Order (December 14, 2001) at 17-19 (attached as Exh. J to ACD Second Partial SJ Motion). Another federal case applies the term "affected area" in the context of determining whether mining operations exceed the two acres triggering federal or state regulation. *Patrick Coal Corporation v. Office of Surface Mining Reclamation and Enforcement*, 661 F.Supp. 380, 384-85 (W.D. Va. 1987). The term "affected area" also has relevance in determining the area that must be reclaimed. UT ADC R645-301-

541.100; 30 C.F.R. § 810.2(c).

Nothing in the Division's regulations suggest that the term "affected area" and the public road exclusion it contains is intended to limit the Division's obligations here to assess the impact of hauling coal on the Panguitch National Historic District. The cultural/ historic analysis required is not limited to the area or roads requiring permits, but includes "adjacent areas." UT ADC R645-301.411.140. "Adjacent area" includes an area that "reasonably could be expected to be adversely impacted by proposed coal mining and reclamation operations." UT-ADC R645-100-200. "Reasonably foreseeable transportation routes" appropriately fall within the adjacent area to be analyzed for impacts of the proposed mine on cultural and historic resources. The Division itself recognized as much. Pet. Req. at 25. The hundreds coal truck trips each day projected as part of the Coal Hollow Mine operations would not occur but for the mine.[2]

The Board need not concern itself with whether the Division's road criteria are lawful or whether they require a permit in this case. Petitioners have not argued that ACD requires a permit to haul coal on Highway 89. Even if Highway 89 is not within the scope of the mining operations that require a permit, the hauling of coal on Highway 89 is an effect of the proposed mine that must be analyzed under state and federal historic

[2] Federal case law interpreting the National Historic Preservation Act reinforces a broad reading of the term "adjacent areas" when determining the scope of the geographic area to be evaluated for purposes of protecting cultural and historic resources. The "area of potential effects" analyzed under the NHPA is broader then the "permit area." *See e.g., Colo. River Indian Tribes v. Marsh*, 605 F. Supp. 1425, 1437 (C.D. Cal 1985) (rejecting use of a project's "permit area" as the APE for Section 106 consultation); *see also Wilson v. Block*, 708 F.2d 735, 754 (D.C. Cir. 1983) (upholding APE determination that included a project's access road). Federal regulations define "area of potential effects" as "the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties . . . ." 36 C.F.R. § 800.16(d).

preservation laws. The Division's permit regulations must be read consistently with Utah 9-8-404 and with the federal National Historic Preservation Act. Excluding the impacts of the hundreds of new trips by coal trucks on Highway 89 through the Panguitch National Historic District would defeat the intent of both Utah 9-8-404 and the NHPA.

C. The Application of the Public Road Exclusion Requires a Factual Inquiry.

Finally, even if the Board concludes that some kind of public road exemption is applicable to resolving Petitioners' cultural and historic resource claim, applying the exemption requires a factual inquiry that precludes granting either the Division's Motion to Dismiss or ACD's Second Partial Motion for Summary Judgment. Both the 1995 Division letter and the case law cited by ACD clearly establish that determining the applicability of the public road exclusion requires a factual inquiry. In its 1995 letter, the Division states, "Utah fully recognizes that the quantity of public use of a road is not the exclusive consideration to determine whether it is exempt from regulation." *1995 Division Letter* at 1. The Division lists numerous factors that must be considered including whether the permittee is responsible for maintenance of certain existing roads or if state or local governments require mine operators to contribute to road maintenance funds. *Id.* at 2. Likewise, the court in *Harmon* concluded that it must "examine[] the evidence in the record to determine if the roads in question are public roads." 659 F.Supp. at 812. The court went through a careful examination of the specific facts in the case, including testimony presented at a hearing before the court, to reach its conclusion that the road was public and did not require a permit. *Id.* The required factual inquiry necessary to apply the public road exclusion as the Division and ACD suggest precludes dismissing Petitioners' cultural/ historic resource claim or granting summary judgment

prior to the opportunity for an evidentiary hearing.

III.

The Division is Required to Ensure that the Coal Hollow Mine Permit Includes an Effective Air Pollution Control Plan.

The Division's regulations require that each coal mine permit application include a fugitive dust control plan. UT ADC R645-301-423.200 and UT ADC R645-301-424. All coal mine permit applications require a fugitive dust control plan regardless of size. UT ADC R645-301-423.200 and UT ADC R645-301-424. The Division's regulations include two specific requirements for mines with projected production rates exceeding 1,000,000 tons of coal per year. UT ADC R645-301-423. First, the fugitive dust control plan must meet the specifications of UT ADC R645-301-244.100 and UT ADC R645-301-244.300. Second, the permit application must include "an air quality monitoring program to provide sufficient data to evaluate the effectiveness of the fugitive dust control practices . . . to comply with federal and Utah air quality standards." UT ADC R645-301-423.100. ACD has sought authorization for a mine that will produce approximately 2,000,000 tons of coal annually. ACD Second Partial SJ Motion at 2. Petitioners alleged that ACD's permit application did not include a fugitive dust plan adequate to meet the requirements UT ADC R645-301-423. Accepting Petitioners' allegation as true, which the Board must do in reviewing a motion to dismiss, Petitioners have stated a claim to which they are entitled to relief.

The unambiguous language of the Division's own regulations prohibits approval of a permit application that lacks a complete and sufficient fugitive dust control plan. The Division has acknowledged that it has not evaluated the effectiveness of the fugitive dust control plan. Instead, the Division defers to an evaluation by the Utah Division of

Air Quality ("DAQ") that has not yet occurred. If the Division chooses to rely on an air quality permit granted by the DAQ to provide the necessary fugitive dust controls, it must wait until such air quality permit is approved before approving ACD's permit application.

A. Adequacy of Monitoring

Petitioners assert that ACD submitted its fugitive dust plan on October 13, 2009. Pet. Req. at 26. The Division approved ACD's permit application just two days later (ACD Second Partial SJ Motion at 3) calling into question whether the Division first determined that the fugitive dust plan – including the monitoring provided – was adequate to meet the requirements of UT ADC R645-301-423. The plan relies on "EPA Method 9" for monitoring the effectiveness of the proposed fugitive dust controls. On its face, this method is designed for monitoring the opacity of plumes from stationary sources. Pet. Req. at 26. Petitioners alleged that the Division did not evaluate whether the fugitive dust control plan was adequate to meet its permit regulations. *Id.* Instead, the Division explicitly acknowledged that it "does not have the expertise to evaluate the use of method 9." *Id.*

Neither the Division nor ACD argue that the Division determined that the fugitive dust control plan was adequate. Rather, the Division argues that it can defer evaluation of the fugitive dust control plan to DAQ's evaluation of air quality permits. Div. Motion to Dismiss at 8. ACD makes a similar argument relying on an MOU dated September 1, 1999, providing that "DAQ will evaluate the fugitive dust control plan prior to issuance of the air quality permit." ACD Second Partial SJ Motion at 21. Yet, a complete and adequate fugitive dust control plan is a prerequisite to permit approval by the Division under its own regulations. UT ADC R645-301-423. If the Division chooses to defer to

DAQ's evaluation of the fugitive dust control plan as part of approving the air quality permit, the Division must wait until the air quality permit is approved before it can satisfy its legal obligations under its own regulations for approval of permit applications.

Even if the Board believes that the Division could approve the permit prior to DAQ's evaluation of the air quality permit, disputed material facts preclude granting either the Division's motion to dismiss or ACD's motion for partial summary judgment regarding the air quality claim. For example, whether EPA Method 9 provides effective monitoring of fugitive dust is a question of fact subject to dispute. This is the kind of question the adjudicatory hearing provided for in the Board's regulations is designed to address. Dismissal of this claim prior to providing Petitioners the opportunity for discovery and prior to the Board's consideration of evidence on the issue is unlawful.

B. Need to Address Clarity of Night Sky

The arguments by the Division and ACD to exclude the issue of the clarity of the night sky ignore the relevance of fugitive dust to visibility both during the day and at night. The Division's regulations contain an unambiguous requirement to include a fugitive dust control plan in the permit application. UT ADC R645-301-423.200. The control plan must ensure that "all exposed surface areas will be protected and stabilized to effectively control erosion and air pollution attendant to erosion." UT ADC R645-301-244.100. The unambiguous language of the Division's regulations requires that the control plan "effectively control . . . air pollution attendant to erosion." *Id.* Impacts to visibility both during the day and night are one type of air pollution attendant to erosion. In the words of the Forest Service, "Night sky quality is principally degraded by light pollution – emissions from outdoor lights that cause direct glare and reduce the contrast

of the night sky – but atmospheric clarity as plays a role." Letter from Donna Owens, District Ranger, Powell Ranger District, Dixie National Forest, to Mary Ann Wright, Associate Director, Mining, Division of Oil, Gas, & Mining (May 9, 2008).

Contrary to the Division's assertion in its motion (Div. Motion to Dismiss at 8), potential impact to the clarity of the night sky is more than speculation by the Petitioners. Supervisors of both the Dixie National Forest and Bryce Canyon National Park raised concerns about the impact of the proposed Coal Hollow mine on the clarity of the night sky of the areas they manage. As indicated above, the District Ranger for Dixie National Forest wrote directly to the Division of Oil, Gas & Mining to raise these concerns. The letter from Eddie Lopez, Supervisor of Bryce National Park was also included in the record considered by the Division when evaluating the proposed Coal Hollow Mine application.

In fact, the Division itself in its Technical Analysis of the permit application acknowledged the need to address the clarity of the night sky. The Technical Analysis provides: "the Applicant has not discussed the effect on the night sky as seen from Bryce Canyon N.P. and the Dixie N.F. Therefore, this deficiency remains and must be addressed prior to receiving a recommendation for approval." *See Final TA* at 83.

The fact that the Bureau of Land Management is evaluating the quality of the night sky in conjunction with the draft environmental impact statement for the federal coal lease that ACD is seeking does not excuse the Division from its legal obligation to address the issue before approving its permit. ACD argues that the National Environmental Policy Act ("NEPA") is not applicable to the issuance of a State mine permit on private lands. ACD Second Partial SJ Motion at 22. Petitioners' arguments do

not rely on NEPA. The Division has an independent legal obligation – separate from NEPA – to ensure that any coal mine permit it approves includes a fugitive dust control plan that "effectively control[s] . . . air pollution attendant to erosion." UT ADC R645-301-244.100; UT ADC R645-301-423.200.

At the very least, whether the clarity of night sky is "air pollution attendant to erosion" is the kind of factual question the adjudicatory hearing provided for in the Board's regulations is designed to address. Dismissal of this claim prior to providing Petitioners the opportunity for discovery and prior to the Board's consideration of evidence on the issue is unlawful.

IV.

The Division is Required to Ensure that the Coal Hollow Mine Permit Includes Adequate Protections for Wildlife Including Sage Grouse.

The Division's regulations require that each coal mine permit application contain "a plan for protection of vegetation, fish, and wildlife resources throughout the life of the mine." UT ADC R645-301-330. The application must include "fish and wildlife information for the permit area and adjacent areas." UT ADC R645-301-322. Petitioners alleged in their request for agency action and a hearing that ACD's permit application failed to include a plan that would adequately protect wildlife resources including sage grouse. Pet. Req. at 34. Accepting Petitioners' allegation as true, which the Board must do in reviewing a motion to dismiss, Petitioners have stated a claim to which they are entitled to relief. The unambiguous language of the Division's own regulations prohibits approval of a permit application that does not contain a plan that ensures "protection of . . . wildlife resources throughout the life of the mine."

In its Motion to Dismiss, the Division misinterprets Petitioners' argument. The

Division argues that Petitioners incorrectly insert into the permit approval regulations a requirement for approval of a fish and wildlife protection plan by the Utah Division of Wildlife Resources ("DWR"). Div. Motion to Dismiss at 9. Nothing in Petitioners' argument, however, relies on a legal requirement for DWR approval. Instead, Petitioners asserted that DWR raised several deficiencies with ACD's proposed wildlife protection plan. Pet. Req. at 34. Based on the permit application documents publically available, Petitioners alleged that these deficiencies had not been addressed and that such failure demonstrated the inadequacy of the protection plan. The legal requirement asserted by Petitioners was the requirement of an adequate plan to protect wildlife resources prior to permit approval. The unambiguous language of the applicable regulations includes such a requirement. UT ADC R645-301-330.

The evidence of a monitoring plan for road kill provided by ACD in their motion for summary judgment does not justify granting ACD's motion. Petitioners' wildlife claim was based on the best available knowledge to them at the time the request for agency action and hearing was filed. Petitioners asserted that DWR criticized the mitigation plan for the failure to "efficiently monitor and remove road kill by haul trucks." Pet. Req. at 34. Based on their review of the permit application documents publically available, Petitioners asserted that ACD had not taken steps to monitor or limit road-kill. *Id.* ACD now offers evidence of what it will do to monitor road kill. ACD Second Partial SJ Motion at 9. It is unclear whether the Division considered this information prior to approving ACD's permit. While such evidence may be appropriate for an evidentiary hearing to evaluate the adequacy of the wildlife protection plan, it is not a lawful basis for granting a motion to dismiss for failure to state a claim or a motion

for summary judgment. Moreover, the evidence of the monitoring plan does not address the other inadequacies with the wildlife protection plan alleged by Petitioners.

Neither the Division nor ACD disputes the legal obligation to include a wildlife protection plan in the permit application prior to approval of the permit. Whether or not the plan submitted is adequate is exactly the kind of question the adjudicatory hearing provided for in the Board's regulations is designed to address. Dismissal of this claim prior to providing Petitioners the opportunity for discovery and prior to the Board's consideration of evidence on the issue is unlawful.

Dated: January 25, 2010

Respectfully submitted,

By: /s/ Sharon Buccino

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of January, 2010, I served a true and correct copy of **PETITIONERS' MEMORANDUM IN OPPOSITION TO DIVISION'S MOTION TO DISMISS CERTAIN CLAIMS AND ALTON COAL DEVELOPMENT'S SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT** to each of the persons listed below via e-mail transmission.

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